

13442 PHM-1  
Mr. Volpe

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-196276

**DATE:** April 15, 1980

**MATTER OF:** Werner F. Michel - Overtime Compensation  
for Surveillance Activities ]

**DIGEST:** Agent of Bureau of Alcohol, Tobacco, and Firearms was assigned to surveillance project for 6-week period. Amount of overtime performed was not predictable and did not recur on successive days or after specified intervals. Thus, overtime was not "regularly scheduled", and agent may not be compensated for time and one-half overtime in addition to premium pay for administratively uncontrollable overtime.

This decision is in response to the appeal of Mr. Werner F. Michel from our Claims Division's settlement (Z-2812231), August 15, 1979, denying his claim for additional overtime compensation. The issue is whether Mr. Michel is entitled to compensation for regularly scheduled overtime in addition to annual premium pay for administratively uncontrollable overtime in connection with surveillance work he performed during a 6-week period.

Mr. Michel, an agent with the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, was assigned from March 26 to May 7, 1978, to a surveillance project which involved substantial amounts of overtime. The scheduled tours of duty for the surveillance project were 5 p. m. to 6 a. m. and 5 a. m. to 6 p. m., and during this 6-week period Mr. Michel claimed reimbursement for 91-1/2 hours of regularly scheduled overtime. Mr. Michel worked different shifts on 7 consecutive days from March 28 to April 3, 1978, and during this period he reported for duty early or remained late on an irregular basis and without prior scheduling. For the period from April 4 to May 7, 1978, Mr. Michel's participation in the surveillance project was limited to only four 13-hour shifts, and on those 4 days he reported early or remained late without prior scheduling. In addition, there was no recurring pattern to Mr. Michel's overtime work during these 4 days.

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The agency denied Mr. Michel's claim on the ground that the hours of overtime claimed were administratively uncontrollable overtime and he was already receiving annual premium pay for all overtime except regularly scheduled overtime. Mr. Michel

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filed a grievance, and the grievance examiner held that the overtime was scheduled in advance and was not "irregular". The grievance examiner also held that the grievant was not responsible for recognizing, without supervision, the circumstances which required him to remain on duty. Finally, the grievance examiner concluded that the uncertainty of the duration of the surveillance was irrelevant and that Mr. Michel should receive time and one-half overtime compensation for 91-1/2 hours of regularly scheduled overtime. The examiner's recommendation was reversed by the Chief, Personnel Division, who issued a final decision on the grievance holding that Mr. Michel was not entitled to additional pay. Mr. Michel then filed a claim with our Claims Division.

The agency agrees that the 13-hour shifts were scheduled in advance, but it contends that such scheduling was only one of the factors for determining whether overtime is regularly scheduled and that an examination of all factors shows the overtime to be administratively uncontrollable overtime. The agency argues that by its very nature surveillance work has an uncertain duration since it would terminate with the arrest of the suspect. The agency points out that in surveillance work generally the employee is responsible for recognizing, without supervision, the circumstances which require him to remain on duty, a work situation which qualifies the employee for premium pay for administratively uncontrollable overtime. See 5 C.F.R. § 550.153 (1978). Finally, the agency argues the overtime performed by Mr. Michel cannot be considered "regularly scheduled" since it was not scheduled to recur on successive days or after specified intervals.

The authority for the payment of annual premium pay for administratively uncontrollable overtime is contained in 5 U.S.C. § 5545(c)(2) (1976), which provides that:

"an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium

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pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty \* \* \*."

The applicable regulations contained in 5 C.F.R. § 550.153 (1978), state that it must be inherent in the nature of the position that the hours of duty cannot be controlled administratively. The regulations state further, in pertinent part, that:

"\* \* \* A typical example of a position which meets this requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it. He is often required to perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities. His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required." 5 C.F.R. § 550.153(a).

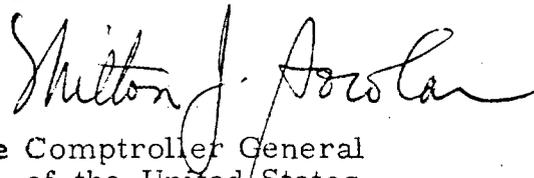
In contrast to administratively uncontrollable overtime, "regularly scheduled" overtime is compensable at one and one-half times the hourly rate, but not in excess of the minimum rate for GS-10. See 5 U.S.C. § 5542 (1976). Premium pay under section 5545 and regularly scheduled overtime under section 5542 are two distinct forms of compensation, and while an employee may receive both forms, he cannot claim both for the same work. Sky Marshal Program, B-151168, May 25, 1976; and B-172622, March 23, 1973. See also Burich v. United States, 177 Ct. Cl. 139, at 145 (1966).

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Our Office has long held that "regularly scheduled" work must be duly authorized in advance and scheduled to recur on successive days or after specified intervals. 52 Comp. Gen. 319 (1972); and 48 id. 334 (1968). This is to be distinguished from overtime work which is scheduled on a day-to-day or hour-to-hour basis where the overtime varies with no discernible pattern. See Customs Special Agents, B-191512, October 27, 1978. The agency in opposing Mr. Michel's claim contends that surveillance work by its nature is administratively uncontrollable and thus may not qualify for "regularly scheduled" overtime. We point out that, although the same argument was raised in our decision in Customs Special Agents, supra, we held that surveillance work which was assigned in advance and scheduled to recur on successive days at specified intervals was considered "regularly scheduled" where the amount of overtime was predictable and followed a discernible pattern.

In the present case, the surveillance work was assigned in advance by the group supervisor and each agent was assigned to certain 13-hour shifts during a 2-week period, with changes in that schedule made for illness, court appearances, or other investigations. As shown above, Mr. Michel's overtime schedule was very irregular, and it appears that the amount of his overtime was not predictable and did not follow a discernible pattern. Mr. Michel was assigned to different shifts on different days each week, and the hours of overtime compensation that he claimed varied from the hours he was scheduled to work. This overtime work did not recur on successive days or after specified intervals and, therefore, may not be considered "regularly scheduled."

Accordingly, we sustain our Claims Division determination denying Mr. Michel's claim for overtime compensation in addition to the premium pay for administratively uncontrollable overtime he has already received.

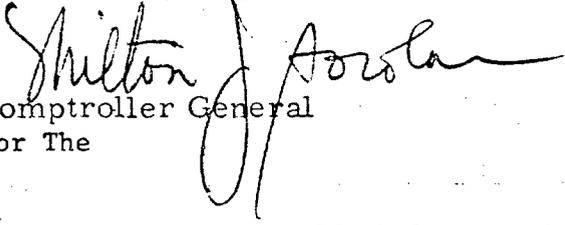


For The Comptroller General  
of the United States

*Memorandum*

April 15, 1980

TO : Associate Director, FGMSD - Claims Group (Room 5858)

FROM :   
Comptroller General  
For TheSUBJECT: Claim of Werner F. Michel for additional overtime  
compensation - B-196276-O.M.

Returned herewith is file Z-2812231 along with a copy of our decision of today, B-196276, sustaining the Claims Division's denial of Mr. Michel's claim.

Attachments - 2